lation that includes additional factors such as listening audience percentages, or shares of local radio advertising revenues.[43] It is also clear that Congress intended that the Commission to use its current definition of a radio "market," and not adopt a different method dependent, in whole or in part, upon the availability of proprietary audience research data or share of national and local advertising revenues.

### B. MODIFICATION OF THE LOCAL RADIO OWNERSHIP RULE AT THIS TIME IS BOTH UNWARRANTED AND UNWISE.

43. Even if it has the authority from Congress to make substantial modifications to §73.3555(a), a matter clearly under dispute,[44] attempts to reintroduce consideration of audience ratings or shares of advertiser revenues is unwise and unwarranted. The Commission lacks expertise in the area of economic analysis of market power, and other agencies of the federal government can and do engage in such activity.[45] Moreover, the Commission's recent experience with administering the "duopoly" rule adopted for radio in 1992, suggests that use of audience research data is both complex and confusing, depriving licensees of the certainty necessary to plan and engage in broadcast transactions,[46] with the resulting waste of time and energy by all concerned in the submitting and processing of ungrantable applications. We should not be doomed to repeat the regulatory mistakes of the past.

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[43] *Cf.*, *NOI*, ¶21 at n. 23.

[44] *See, e.g.*, "Billy Tauzin Takes on the FCC," RADIO BUSINESS REPORT, June 28, 1998, pp. 6-10.

[45] The adoption by the Commission of separate rules and guidelines which differ from those in use by, *e.g.*, the Department of Justice, would lead to confusion, contradiction and delay. And if the same criteria are adopted, there is needless duplication of scarce agency resources.

[46] *see, e.g.*, Hunsaker, *Duopoly Wars: Analysis and Case Studies of the FCC's Radio Contour Overlap Rules*, 2 COMMLAW CONSPECTUS pp 21-41 (1994).

44. But more important, no factual basis exists that would warrant a more restrictive limit on local radio ownership. The fact that there has been significant consolidation in the radio industry is hardly a reason for added restrictions. Consolidation is a result that was specifically contemplated by both Congress and the Commission.[47] The resulting decline in the number of independently owned stations is thus no cause for concern. It was both expected and desired as a way to improve the economic health of the radio industry. It has done so. And, while the economic health of the radio industry has improved, that is no reason to go back to a more restrictive rule on local ownership. The four-tiered market approach adopted by Congress in §202(f) of the Telecommunications Act, provides adequate safeguards against "overconsolidation."[48]

45. A second point of inquiry raised by the Commission is whether or not the current local radio ownership rule has thwarted other Commission public interest goals such as increasing the percentage of ownership of broadcast media held by minorities and females.[49] There would appear to be no causal connection between the two. While it may be true that the number of radio stations owned by minorities declined between 1995 and 1997, there is nothing to suggest that oppor-

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[47]Indeed, the benefits of such consolidation, including economies of scale afforded by joint operation of two or more stations in a market, was the primary reason cited by the Commission in adopting the 1992 Radio Contour Overlap Rules. *Report and Order*, In re Revision of Radio Rules and Policies, 7 FCC Rcd 2755, ¶2, 70 RR 2d 903 (1992), *recon. granted in part*, 7 FCC Rcd. 6387, 71 RR 2d 227 (1992).

[48]In fact, the pace of radio consolidation has now slowed significantly, clearly demonstrating that there is no need to adopt regulatory countermeasures. *See, e.g.*, "Consolidation Slows Down...," RADIO BUSINESS REPORT, July 13, 1998, p. 6.

[49]*NOI, supra.*, ¶22.

tunities for minorities to acquire stations that might otherwise have existed were eliminated as a result of consolidation acquisitions.[50]

46. In any event, other means exist that can more directly influence the number of minority-owned stations. It is no coincidence that the period of decline also matches the period of time that the Commission's former tax certificate policy has been repealed by Congressional action. The Commission's own records reveal that this policy when it was in effect, accounted for more broadcast acquisitions by minorities than any other "affirmative action" policy.[51] And, while the Commission is without authority itself to reinstate the tax certificate policy, it can certainly recommend to Congress that it be reinstituted, this time with additional safeguards. Other policies designed to induce sellers to sell to minority buyers and for lenders to provide financial assistance to such groups are possible and more likely to achieve the Commission's stated objective of increasing the percentage of minority ownership in the radio industry.[52]

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[50]The only possible basis for drawing such a conclusion is that the lifting of local ownership restrictions has, by itself, caused such an increase in the valuation of radio stations so as to price them out of reach of undercapitalized minority groups. Such an argument has, in fact been made, despite the fact that station values rose significantly in the 1980's even without the benefit of a relaxed local ownership rule. In any case, it would be a monstrous perversion of public policy and a total breach of the Commission's obligation to act in public interest for it to attempt to artificially lower the market value of radio stations nation wide so as to make them more affordable to minorities.

[51]Unlike the Commission's former comparative hearing policy that permitted a split as between voting control and equitable ownership, the more restrictive requirement of 51% equitable ownership by minorities of the tax certificate policy provided much greater assurance that the entity acquiring the station was not a sham.

[52]Recent Supreme Court decisions suggest that a number of regulatory schemes designed to increase minority ownership and participation as the expense of nonminority citizens simply will not pass Constitutional muster. Policies which in effect constitute "reverse discrimination" are unsound, harmful to society, and in any event, unlikely to be upheld by the Courts.

47. What of female ownership? As the Commission itself has noted, there is a lack a data on the number of females who own all or part of a radio broadcast facility.[53] The Commission could certainly get a rough idea of the percentage of female ownership by reviewing its own ownership records. But even if it is found that female ownership is significantly less than male ownership, that would not warrant adopting a policy that exceeds the Commission's authority to promulgate and could likely to run afoul of the First, Fifth and Fourteenth amendments to the U.S. Constitution.[54] Such blatant attempts to engage in unauthorized and unwarranted, and potentially dangerous social engineering should be discouraged.[55]

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[53]*NOI, supra.*, ¶22, n. 24. ELBC would speculate here that a study of the gender of broadcast owners in corporate and related entities would reveal that considerable ownership of the stock is in the name of a husband and wife as joint tenants or owned by females outright.

[54]*Cf., Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985). The Court struck down the Commission's female ownership comparative preference policy without reaching the Constitutional question. Moreover, a policy judgment made by the Commission that certain societal groups, *i.e.,* minorities and women, are more deserving than others of the right to use the public airwaves, is, at bottom, a content-based restriction of the First Amendment right to freedom of speech.

[55]"Billy Tauzin Takes on the FCC," *supra*, note 44

## CONCLUSION

WHEREFORE, the above premises considered, ELBC respectfully urges the Commission, to amend its ownership rules, by REPEALING Section 73.3555(d) with respect to AM and FM radio broadcast stations. ALTERNATIVELY, the rules should be substantially relaxed to apply only to "egregious cases," as set forth above.[56]

FURTHER, the Commission should refrain from adopting new rules or modifying Section 73.3555(a) with respect to local radio ownership.

Respectfully submitted,

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[56] *See* ¶39 *supra*, and accompanying note.